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In the Supreme Court of the United States

October Term, 1982

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

vs.

JOSEPH DURIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED FOR REVIEW

Does the acceptance by an injured longshoreman of voluntarily paid compensation and the filing of Form LS-208 by his employer with the deputy commissioner trigger the assignment provisions of section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act?

LIST OF ALL PARTIES

Joseph Duris - Plaintiff-Appellant

Erato Shipping, Incorporated;

Japan Line Limited;

Regent Botan Shipping, Inc.;

Pallas Shipping Agency, Ltd.
Defendants-Appellees

Joseph Duris is the Respondent herein. Pallas Shipping Agency, Ltd. is the sole Petitioner herein.

DESIGNATION OF CORPORATE RELATIONSHIPS

Pallas Shipping Agency, Ltd., was incorporated under the laws of Liberia on March 18, 1977. On October 27, 1977, it entered into "Articles of Merger" with Erato Shipping, Incorporated. Pallas Shipping Agency, Ltd., has no subsidiaries and has no corporate connections with Japan Line Limited or Regent Botan Shipping, Inc.

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No.

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For the Sixth Circuit

OPINION BELOW

The opinion of the United States Court of Appeals is unreported. It bears the title of *Joseph Duris v. Erato Shipping, Incorporated; Japan Line Limited; Regent Botan Shipping, Inc.; Pallas Shipping Agency, Ltd.*, and is reprinted in the Appendix to this petition.

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit sought to be reviewed herein was entered on July 16, 1982, and this petition for writ of certiorari is filed within ninety days of that date.

No petition for rehearing was filed in the Court of Appeals. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 33 U.S.C. § 933(a) provides:

"If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person."

Title 33 U.S.C. § 933(b) provides:

"Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person *unless such person shall commence an action against such third person within six months after such award.*" (Emphasis supplied.)

STATEMENT OF THE CASE

The Respondent herein was voluntarily paid compensation by his employer, without an award, for the period from May 20, 1975, to April 26, 1977. On that date his employer filed with the deputy commissioner form SL-208, entitled "Compensation Payment Stopped or Suspended."

On April 8, 1980, Respondent filed an amended complaint against Pallas Shipping Agency, Ltd. That complaint was dismissed by the District Court on the ground that *in personam* jurisdiction over Pallas had not been

established. The issue concerning the time-barring of the Respondent's claim against Pallas by reason of the limitation period in section 33 of the Longshoremen's and Harbor Workers' Compensation Act was not reached by the District Court.

The Court of Appeals ruled that although Pallas has never had any business contacts in Ohio, its constituent corporation, Erato Shipping, did have such contacts and when Erato merged with Pallas, the latter became liable for all of the claims against Erato. On the issue of the time-barring of the claims against Pallas, the Court of Appeals ruled that subsection 33 does not encompass all claims paid under the Act; that the acceptance of compensation payments, in and of itself, does not create an assignment to the employer, and that the third-party claim does not expire in six months.

The Petitioner seeks a review of this ruling of the Court of Appeals.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The ruling of the Court below is contrary to the ruling of this Court in *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596, 101 S. Ct. 1945, 68 L. Ed. 2d 472 (1981), which affirmed the judgment of the United States Court of Appeals for the Second Circuit in 617 F.2d 955 (2nd Cir. 1980). It is also contrary to the ruling of the United States Court of Appeals for the Fourth Circuit in *Simmons v. Sea-Land Services*, 676 F.2d 106 (4th Cir. 1982) and *Ambrosino v. Transoceanic S.S. Co., Ltd.*, 675 F.2d 470 (2nd Cir. 1982) In addition to these conflicts, the Court below declined to follow *Liberty Mutual Insurance Co. v. Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977) and *Larson*

v. Associated Container Transport (Australia) Ltd., 459 F. Supp. 561 (E.D. Va. 1978). The resolving of these conflicts by this Court is, we respectfully suggest, required.

1. In *Rodriguez*, three cases were involved. In two of the cases no formal compensation orders were entered but the plaintiffs and their employers agreed to settlements involving the payment of compensation. One plaintiff filed a third-party suit after 32 months, another after approximately 15 months, and the third one year after accepting compensation. The District Courts granted motions for summary judgment filed by the respondent shipowners because the longshoremen's failure to bring suit within six months had operated to assign their causes of action to their employers. The Court of Appeals for the Second Circuit affirmed and this Court granted certiorari to resolve the conflict with the Court of Appeals for the Fourth Circuit in *Caldwell v. Ogden Sea Transport Inc.*, 618 F.2d 1037 (4th Cir. 1980), 101 S. Ct. 69, 66 L. Ed. 2d 20.

For the purposes of its decision in *Rodriguez, supra*, at page 1948, this Court assumed that the acceptance of compensation by the longshoremen operated as an assignment under § 933(b).

This Court, speaking through Mr. Justice Stevens, stated the issue before it in the following language (101 S. Ct. at p. 1949):

> "• • • The question presented by this case is what, if any, right the longshoreman has against the third-party shipowner if he does not sue within the 6-month period and the employer fails to do so thereafter. *Both the plain language of the statute and the history of its amendments dictate the same answer.*" (Emphasis supplied.)

In referring to the plain statutory language contained in § 933(b), this Court said (101 S. Ct. at p. 1950):

"Application of this plain statutory language to the undisputed facts in these cases leads to the conclusion that petitioners may not pursue their claims for damages against the respondent shipowners. *Petitioners filed these actions well beyond the 6-month period following acceptance of compensation, and offered no excuse for their delay.* Although their employers failed to pursue the assigned claims, the statute does not expressly require that employers pursue third-party claims, nor does it provide for relief to employees should the assigned claims lie dormant. Therefore, petitioners appear to be without a cause of action under the statute. (Emphasis supplied.)

This Court gave extended consideration to the question of the conflict of interest (a matter which is one of the principal reasons for the ruling in the instant case), 101 S. Ct. 1951 (1954), and concluded that the problem was solved by amending § 933(b) to postpone the assignment by operation of law until six months after the acceptance of compensation under an award, and by amending § 933(e) to allow an employer to retain one-fifth of the net proceeds of its successful third-party action.

Finally, this Court said (101 S. Ct. 1957-58):

"In sum, we conclude that the Court of Appeals in these cases correctly held that § 33(b) precludes petitioners from pursuing their third-party claims. Whatever the continued validity of our decision in *Czaplicki*, a question we need not and do not decide today, these cases do not involve 'the peculiar facts' on which *Czaplicki* was based. Rather, petitioners essentially have relied upon conflicts inherent in the statutory

> scheme and in the relationships among longshoremen, stevedores, and shipowners. The notion adopted in some post-*Czaplicki* decisions that a conflict of interest may be presumed whenever an employer does not sue on an assigned claim *is simply untenable in light of the plain statutory language and the history of the 1959 and 1972 Amendments.* • • •" (Emphasis supplied.)

The ruling of this Court in these cases on the issue of the assignment of claims under § 933(b) at the expiration of the six-month period is controlling. The Court below, in the instant case, not only declined to follow *Rodriguez*, but cited it only for the sole proposition that the failure of the employer, after the assignment, to sue, causes the claim to expire (App. p. A5).

2. In each of the cases involved in the consolidated appeals in *Simmons v. Sea-Land Services, et al., supra*, the injured employees received compensation payments which were voluntarily paid. The principal issues before the Court of Appeals for the Fourth Circuit were the identification of the "event or events which create 'an award in a compensation order' sufficient to trigger the six-month period set forth in Section 933(b)" and "whether an assignee who has acquired the claim upon the expiration of the six-month period may reassign that claim to the injured longshoreman." (676 F.2d at p. 108).

In addressing the first issue, the Court of Appeals stated at p. 109:

> "Having determined that Section 933(b) *contemplates an informal award*, we next turn to the requisites of such an award. As revealed by the facts of these cases, a number of events may occur during the disability period which could be interpreted as the culmination of an informal award. However, as we stated in

Ameta, the essence of an award is *'an act of ratification of compensation, whether formal or informal, and the subsequent acceptance by the claimant.'* 564 F.2d at 1102. In addition, the award must serve the dual purpose of protecting the welfare and rights of the longshoreman while not unduly delaying the employer's access to relief from the negligent third party.

"With these concepts in mind, we hold that 'an award in a compensation order' is created by the completion of three events: (1) the employer, having not contravened its liability, initiates compensation payments to the longshoreman; (2) the deputy commissioner files the employer's notice that compensation payments have been initiated; and (3) the longshoreman accepts any of the payments. *Such an award triggers the six-month period without regard to subsequent suspensions in payment or formal awards of benefits.* We believe that this rule will foster the prompt payment of benefits by eliminating the need for perfunctory contravention by the employer, and will provide the employer with access to its remedies within a reasonable time. As in all such cases, the six-month period will protect the longshoreman by giving him an opportunity to investigate and weigh his options." (Emphasis supplied.)

In the case at bar it is uncontradicted that the Respondent accepted compensation for his injuries from his employer and that his employer filed with the deputy commissioner a notice that the "compensation had been stopped or suspended." It is also uncontradicted that the Respondent accepted all of the payments of compensation which were made. Thus all of the requirements for the triggering of the assignment, set forth in *Simmons, supra*, were met. The ruling of the Court below that, in spite

of the succession of these events, the assignment under § 933(b) did not take place, is in direct conflict with the *Simmons* decision.

3. In *Ambrosino v. Transoceanic S.S. Co., Ltd., supra*, the longshoremen accepted compensation from their employer following an informal conference convened by a Department of Labor claims examiner. No formal compensation orders were entered. They then brought suit against the vessel owner more than six months after acceptance of payment from their employer. The District Court granted the shipowner's motion for summary judgment. 675 F.2d at p. 471.

The Court of Appeals for the Second Circuit ruled that the amendment to the regulations of September 9, 1977, did not change the result reached in *Rodriguez*, 617 F.2d 955 (2nd Cir. 1980), and that an agreement to pay compensation reached at an informal conference constituted an "award in a compensation order." 675 F.2d at p. 472.

In *Rodriguez v. Compass Shipping Co., supra*, the longshoreman brought a personal injury action against the vessel owner and charterer. The Circuit Court of Appeals affirmed the decision of the District Court in dismissing the suit and ruled that the acceptance of compensation pursuant to an agreement with his employer and approval by a claims examiner, plus the failure to sue within six months, operated to automatically assign the claim to his employer under the provisions of § 933(b). In support of its ruling in that regard, the Court, at p. 956, cited the following decisions:

Panzella v. Skou, 471 F. Supp. 303 (D.C. N.Y. 1979);

Francavilla v. Bank Line, Ltd., 470 F. Supp. 94 (S.D. N.Y. 1979);

Perez v. Arya National Shipping Line, Ltd., 468 F. Supp. 799 (S.D. N.Y. 1979);

Hernandez v. Costa Armatori, 467 F. Supp. 1064 (E.D. N.Y. 1979);

Perez v. Costa Armatori, 465 F. Supp. 1211 (S.D. N.Y. 1979);

Bandy v. Bank Line, Ltd., 442 F. Supp. 882 (E.D. Va. 1977).

In *Larson v. Associated Container Transportation (Australia) Ltd., supra*, an action brought by an injured longshoreman against the shipowner was dismissed by the District Court as untimely because not filed within six months from the acceptance of compensation and the filing of documents with the Department of Labor. In so doing, the Court stated (459 F. Supp. at p. 564):

"Thus, the Court concludes that the payment of benefits under the LHWCA with the requisite filing of documents and reports with U. S. Department of Labor *and the acceptance of those payments by the plaintiff started the six-month period of section 33(b) to run.* That these filings, payments and acceptance of compensation should be deemed to constitute an informal award so as to begin the six-month period is buttressed further by the provisions of sections 14(h), (i). 33 U.S.C. §§ 914(h), (i). Under those sections, the deputy commissioner at any time in a case in which payments are being made without a formal award may take such action necessary, including requiring an employer to deposit monies with the United States, to secure payment of compensation to the injured person.

"The absence of such action or any other intervention by the deputy commissioner after the commencement and acceptance of payments and receipt of requisite fil-

> ings by the employer *constitute sufficient acceptance and ratification of such compensation to amount to an informal award under section 33(b)*. As noted above, any contrary result would operate only to give an employer every incentive to controvert liability in all cases or to terminate compensation at an early stage in order to protect his statutory right to an assignment and to deny the injured person prompt monetary and medical assistance at a time when he needs it the most." (Emphasis supplied.)

In *Liberty Mutual Ins. Co. v. Ameta & Co., supra,* the insurer of the employer, a stevedoring company, brought an action against the shipowner and the injured longshoreman, who was paid benefits under the LHWCA but who also obtained voluntary settlement from the shipowner. The District Court entered judgment in favor of the insurer for $1,000 but ruled in favor of the shipowner and longshoreman with respect to the remainder of the insurer's lien. The insurer appealed and the shipowner and longshoreman cross-appealed. On the issue involved in the instant case the Court of Appeals ruled that the documents which were received, filed and accepted by the Deputy Commissioner constituted an "award of benefits in a compensation order" despite the absence of the entry of a formal award and that the longshoreman's rights had been assigned to the insurer (564 F.2d at pp. 1101 and 1102).

The controlling effect of the acceptance of compensation by the injured longshoreman is emphasized by the Court of Appeals for the Fourth Circuit at page 1102, where it states:

> "Two decisions and reference to parallel language regarding 'awards' in various sections of the Act demonstrate that an award under a compensation order does not require formal entry of an award *per se*. *Rather,*

the focus should properly be upon some act of ratification of compensation, whether formal or informal, and the subsequent acceptance of compensation by the claimant." (Emphasis supplied.)

The refusal of the Court below to follow either *Larson* or *Liberty Mutual* is clear and unequivocal (App. p. A3). It is also unjustified.

CONCLUSION

For the reasons set forth herein and because the Court of Appeals for the Sixth Circuit has, in its holding that the mere receipt of compensation benefits under the Act, plus the filing of Form LS-208, does not trigger the assignment provision of Section 933(b) is contrary to and in direct conflict with the ruling of this Court in *Rodriguez v. Compass Shipping Co., Ltd.*, the ruling of the Court of Appeals for the Fourth Circuit in *Simmons v. Sea-Land Services, Inc.* and *Liberty Mutual Insurance Company v. Ameta & Company* and the Court of Appeals for the Second Circuit in *Ambrosino v. Transoceanic S.S. Co., Ltd.*, the resolving of these conflicts by this Court is required. Petitioner prays that a Writ of Certiorari issue to review the opinion of the Court of Appeals for the Sixth Circuit, entered herein on July 16, 1982.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed July 16, 1982)

No. 81-3250

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH DURIS,
Plaintiff-Appellant,

v.

ERATO SHIPPING, INCORPORATED; JAPAN LINE LIMITED; REGENT BOTAN SHIPPING, INC.; PALLAS SHIPPING AGENCY, LTD.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Before: KENNEDY and MARTIN, *Circuit Judges;* and DUMBAULD, *Senior District Judge.**

BOYCE F. MARTIN, JR., *Circuit Judge.* Joseph Duris appeals the dismissal of his personal injury action. The District Court dismissed Duris' claim for failure to establish in personam jurisdiction over the defendant Pallas Shipping Agency, Inc.

*Honorable Edward Dumbauld, Senior Judge, United States District Court for the Western District of Pennsylvania, sitting by designation.

Duris was injured in May, 1975 while working as a longshoreman on a vessel in the Port of Toledo, Ohio. He originally tried to sue Erato Shipping, the vessel's dry boat charter. Erato Shipping was subsequently merged into the present defendant, Pallas Shipping.

On appeal, Pallas argues that the District Court properly dismissed Duris' complaint because Pallas, as distinct from Erato, has never had sufficient business contacts in Ohio to bring it within the reach of that state's long arm jurisdictional statute.[1] In the alternative, Pallas contends that Duris' action is time barred by the limitations period of the federal workmen's compensation statute under which he received benefits. We find no merit in either argument and reverse. We will consider Pallas' second, more difficult argument, first.

Shortly after his injury, Duris began to receive benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* Under that statute and its regulations, injured employees receive compensation in one of two forms. If the employer controverts the claim, any benefits are paid pursuant to an award documented in a compensation order. 33 U.S.C. § 914; 20 C.F.R. §§ 702.251-.351 (1981). If, on the other hand, the claim is not contested, compensation is paid voluntarily without an award. 33 U.S.C. § 914, 20 C.F.R. §§ 702.231-242 (1981). It is undisputed that Duris' benefits were paid voluntarily; the Secretary of Labor entered no compensation order or award in this case.

According to section 33 of the Act, if benefits are paid under an award, any claim the employee might have against a third party will be assigned to the employer

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1. Ohio Revised Code § 2307.382.

unless the employee brings his own action within six months of such an award:

> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

33 U.S.C. § 933(b).

This subsection does not appear to cover Duris' claim. The Act, as noted earlier, makes purposeful use of the term "award." Thus, if benefits are paid without an award, there shall be no assignment and no six-month limitation period. Nevertheless, at least one court has held that the mere receipt of compensation benefits constitutes an "award" and so triggers section 33. *Larson v. Associated Container Transport (Australia)*. 459 F. Supp. 561 (E.D.Va. 1978). Similarly, the Fourth Circuit has held that the routine filing of the documents which must accompany even benefits paid without an award are sufficient ratification and acceptance to constitute a formal award. *Liberty Mutual Insurance Co. v. Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977). On the basis of this authority, Pallas argues that Duris' acceptance of compensation in May, 1975 triggered section 33 and its short statute of limitations, which expired prior to the 1977 commencement of this action. With all respect, we decline to follow *Liberty Mutual* and *Larson*.

Those cases' rationale for ignoring the narrow assignment embodied in section 33 is that unless the assignment provision is read broadly to include every longshoreman's

claim, the many claims paid without an award will never be assigned to the employer. This result, the argument continues, is inequitable because without the assignment, the employer, or its subrogee insurance carrier, cannot seek reimbursement from any negligent third party. Thus, to protect itself, the employer would needlessly controvert every claim in order to gain a formal award and hence the opportunity for an assignment. Unless remedied by a broad interpretation of section 33, these non-disputes will increase costs while slowing payments to injured employees. *See Liberty Mutual, supra,* at 1103.

This fear is unfounded. Employers are not dependent upon the employee's claim for reimbursement purposes. In *Federal Marine Terminals v. Burnside Shipping Co.,* 394 U.S. 404 (1969), the Supreme Court held that the employer's remedy under section 33 is not exclusive. Instead, in the typical situation where a stevedoring contractor, the employer, seeks reimbursement from a negligent shipowner, federal maritime law would permit a tort action in the employer's own right for breach of the shipowner's duty of due care:

> We must also reject the implication of the Court of Appeals' opinion that under federal maritime law the shipowner owed the stevedoring contractor no duties whose breach would give rise to a direct action for damages.
>
> As we held in Kermarec v. Compagnie Generale Transatlantique, 358 US 625, 632, 3 L Ed 2d 550, 555, 79 S Ct 406, "the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." That duty of due care imposed by law extends to the stevedoring company as well as to others lawfully on

> the ship, and its breach gives rise to a cause of action for any damages proximately caused. It is not disputed, for example, that if the ship owner's negligence caused damages to the stevedoring contract's equipment, those damages would be recoverable in a direct action sounding in tort. We can see no reason why the shipowner's liability does not in like fashion extend to the foreseeable obligations of the stevedoring contractor for compensation payments to the representative of a longshoreman whose death was occasioned by the shipowner's breach of his duty to the stevedoring contractor.

Id. at 414-415. *See also Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981).

Furthermore, we believe that a broad interpretation of section 33 would vitiate the policy behind its narrowly precise language. Congress might well have sought to assign away an employee's claim only in those cases where the injured longshoreman is likely to be cognizant of the statutory assignment. Although not strictly an election of remedies, the loss of one's personal injury action through an assignment is not without potentially substantial consequences. Once the assignment has been effected, the employee loses all control over the action. Should the employer decide not to sue, the claim will expire. *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596 (1981). Unwilling employees should not suffer this consequence. Indeed, the "award" language was added to the statute in 1938 to prevent exactly that ocurrence.[2] H. R. Rep.

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2. The United States Employment Compensation Commission was the moving force behind this amendment. Lewis Dalby, chief counsel for the Commission, made the following comments at the July 31, 1935 House of Representatives Subcommittee hearing on H.R. 8293:

(Continued on following page)

No. 1945, 75th Cong., 3d Sess. 9; *Rodriguez, supra*, at 605. Prior to 1938, assignment occurred immediately upon the acceptance of compensation. Appellee's position would return the Act to its pre-1938 form with the single added protection of a six-month period in which the employee, who has done no more than passively accept benefits, may or may not learn of the impending loss of his claim.

In contrast, where a claim has been paid pursuant to an award, the employe, by virtue of the claim's contravention, is likely to have been brought into sufficient contact with the statute so as to ensure some cognizance of the assignment provision. Thereafter, the employee can make an informed decision. If his employer, or its insurance carrier, appears willing to maintain the action, he may allow the right to pass, knowing that the employer is entitled to recover fully on his claim. This, perhaps, is the favored result in light of the employer's greater ability to maintain a legal action. Alternatively, the employee

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Footnote continued—

> The only remaining section, section 10, relates to the provision of section 33, which provides that the acceptance of compensation by an injured employee shall work an assignment of his right against a third party who has caused his injury. Undoubtedly, very often employees accept compensation without realizing that effect upon their rights. So that the purpose of this is to make the assignment of the right of action arise only when compensation is accepted on an award made by the deputy commissioner. In other words, when the injury occurs, the mere fact that the employer or insurance carrier hurries up and sends a payment around, which is accepted, without knowing that that would take away the entire right, which may be very valuable, that assignment would not arise in such a case, but only if the case had gone to the deputy commissioner and had been formally heard and an award issued, so that there would be opportunity for the injured man, or those acting for him or as beneficiaries, to find out the effect of such an acceptance of compensation before taking it.

Proposed Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Hearings on H.R. 8293 before the Subcomm. on the Judiciary, 74th Cong., 1st Cong., 1st Sess. (1935).

will realize that he must act rather quickly or risk losing the right to control the action altogether.

In rebuttal, appellees argue that an informed decision on the employee's part is not critical because in any instance where the injury can be traced to a negligent third party, the employer's interest in recovering the compensation paid will simultaneously protect the rights of the employee. Furthermore, the Act provides an additional incentive by allowing the employer to keep twenty percent of any recovery over the costs of litigation and all compensation due. 33 U.S.C. § 933(d). Given these inducements and the greater resources of the employer, a broad interpretation of section 33 will benefit both the employer and the employee.

This analysis loses its appeal, however, if we consider the very real threat of conflicting interests between employer and employee.

As noted earlier, the most likely third party tortfeasor will be the vessel's owner or charterer, the owner or lessee of the longshoreman's workplace. On the other hand, the employer-assignee is by definition a stevedoring contractor whose clients are those very same shipowners or charterers. The juxtaposing of this stevedore-client relationship between the employee and the tortfeasor presents obvious disincentives to the bringing of the employee's action by the employer. If the employer-assignee depends to any significant degree upon the shipowner or charterer for future business, the probability that it will enforce the rights of its injured employee against the third-party client is reduced. Nor will the likely imposition of the employer's carrier-subrogee between it and the third-party client alleviate the conflict. The insurance company can hardly ignore the business relationships of its

own clients. This conflict of interest problem makes us hesitate to countenance any interpretation of the Act which would expand the assignment provisions of section 33. If in fact the employer is unlikely to vindicate the rights of the employee, an assignment becomes increasingly similar to the harsher legal doctrine of election of remedies. Such a substantive reinterpretation of the statute lies far beyond the power of this court.

We will not, therefore, read section 33 to encompass all claims paid under the Act. Where, as here, the injured employee has merely accepted compensation payments, no assignment occurs and the third-party claim does not expire in six months. The Second Circuit gave due consideration to the policy against unwitting assignments and reached a similar conclusion. *Rodriguez v. Compass Shipping Co., Ltd.*, 617 F.2d 955 (1980), *aff'd on other grounds*, 451 U.S. 596 (1981).

Our holding today is that the mere receipt of compensation benefits under the Act does not trigger the assignment provision of section 33(b). Hence Duris' claim is not time barred. *See generally Dunbar v. Retla Steamship Co.*, 484 F.Supp. 1308 (E.D.Penn. 1980).

The second question is quickly resolved. In its order, the court below concluded that service of process against Pallas Shipping was improper because that company had never done any business in Ohio. Requiring Pallas to submit to suit in Ohio would, in the court's opinion, offend the constitutional notions of fair play set out in *International Shoe v. Washington*, 326 U.S. 310 (1945).

This ruling was erroneous. Although Pallas Shipping has never had any business contacts in Ohio, its constituent corporation, Erato Shipping, clearly has. No one disputes that Erato was the bareboat charterer of the vessel upon

which Duris was injured and that Erato subsequently merged with Pallas. In this diversity action we are bound to apply Ohio law. *Poyner v. Erma Werke Gmbh*, 618 F.2d 1186, 1187 (6th Cir.), *cert. denied sub nom. Insurance Co. of North America v. Poyner*, 449 U.S. 84 (1980). That law clearly states that after a merger, the surviving corporation is liable for all claims against the constituent corporation:

> When a merger of consolidation becomes effective:
>
> The surviving or new corporation is liable for all obligations of each constituent corporation, including liabilities of defending shareholders. Any claim existing or action or proceeding pending, by or against any constituent corporation, may be prosecuted to judgment, with right of Appeal, if such merger or consolidation had not taken place, or the surviving or new corporation may be substituted in its place.

Ohio Revised Code § 1701.82(A).

Thus, pursuant to this statute, if Duris can establish Ohio contacts sufficient to gain jurisdiction over Erato Shipping, he may thereby gain jurisdiction over Pallas Shipping. Any other ruling would allow corporations to immunize themselves by formalistically changing their titles.

The judgment is reversed and remanded for proceedings consistent with this opinion.